JS 44 (Rev. 12/07) (cand. rev. 1-16-08)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

E-filing

BZ

**I. (a) PLAINTIFFS**

SAINT FRANCIS MEMORIAL HOSPITAL and FRANKLIN BENEVOLENT CORPORATION F/K/A DAVIES MEDICAL CENTER

**DEFENDANTS**

MICHAEL O. LEAVITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

SAN FRANCISCO

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

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Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff
2 X U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | 1 | 1 | Incorporated *or* Principal Place of Business In This State | 4 | 4 |
| Citizen of Another State | 2 | 2 | Incorporated *and* Principal Place of Business In Another State | 5 | 5 |
| Citizen or Subject of a Foreign Country | 3 | 3 | Foreign Nation | 6 | 6 |

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152 Recovery of Defaulted Student Loans (Excl. Veterans)
153 Recovery of Overpayment of Veteran's Benefits
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195 Contract Product Liability
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230 Rent Lease & Ejectment
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330 Federal Employers' Liability
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950 Constitutionality of State Statutes

**V. ORIGIN** (Place an "X" in One Box Only)

X 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
42 U.S.C. §§ 1395 et seq. and 5 U.S.C. §§ 551 et seq.

Brief description of cause:

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ 0

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes X No

**VIII. RELATED CASE(S) IF ANY** none

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)**
**(PLACE AND "X" IN ONE BOX ONLY)**

X SAN FRANCISCO/OAKLAND SAN JOSE

DATE March 12, 2008

SIGNATURE OF ATTORNEY OF RECORD

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FRANKLIN BENEVOLENT CORPORATION F/K/A
DAVIES MEDICAL CENTER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BZ

SAINT FRANCIS MEMORIAL HOSPITAL and FRANKLIN BENEVOLENT CORPORATION F/K/A DAVIES MEDICAL CENTER

Plaintiffs,

vs.

MICHAEL O. LEAVITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

CASE NO. CV 08 1440

**COMPLAINT FOR JUDICIAL REVIEW OF FINAL ADVERSE AGENCY DECISION ON MEDICAL REIMBURSEMENT**

## I. JURISDICTION AND VENUE

1. This is a civil action brought to obtain judicial review of a final agency decision rendered by the Medicare Provider Reimbursement Review Board ("PRRB"). This action is timely filed pursuant to 42 U.S.C. §1395oo(f)(1).

2. This action arises under Title XVIII of the Social Security Act, as amended (42 U.S.C. §§ 1395 et seq.), hereinafter referred to as the "Medicare Act" or the "Act," which establishes the Medicare program (the "Medicare Program" or the "Program"), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq.

3. This court has jurisdiction under 42 U.S.C.§ 1395oo(f) (appeal of final

Medicare program agency decision) and 28 U.S.C. § 1331 (federal question). Venue lies in this judicial district pursuant to 42 U.S.C. § 1395oo(f) and § 28 U.S.C. § 1391(e). This court has authority to grant the relief requested under 42 U.S.C. § 1395oo(f) and 28 U.S.C. §§ 2201-2202.

## II. PARTIES

4. Plaintiffs Saint Francis Memorial Hospital ("Saint Francis") and Franklin Benevolent Corporation f/k/a Davies Medical Center ("Davies") are each acute care inpatient hospitals located in San Francisco, California (Saint Francis and Davies are referred to collectively as the "Hospitals.") During the relevant period, each of the Hospitals was certified as a "provider of services" participating in the Medicare program within the meaning of 42 U.S.C. § 1395x(u).

5. The Defendant, Michael O. Leavitt, Secretary of the Department of Health and Human Services (hereinafter referred to as the "Secretary"), or his predecessors in office, is the federal officer responsible for the administration of the Medicare Program pursuant to the Medicare Act. The Secretary has delegated administration of the Medicare Program to the Centers for Medicare and Medicaid Services ("CMS").

## III. MEDICARE PAYMENT AND APPEAL

6. The Medicare Act establishes a system of health insurance for the aged and the disabled. Under the Medicare Act, an eligible Medicare beneficiary is entitled to have payment made by the Medicare program on his or her behalf for, *inter alia,* inpatient and outpatient hospital services provided to him or her by a hospital participating in the Medicare program as a "provider of services."

7. CMS, through fiscal intermediaries, pays providers participating in the Medicare Program for covered services rendered to Medicare beneficiaries. 42 U.S.C. § 1395h. The amount of payment owing to a provider for services furnished to Medicare beneficiaries is determined by the fiscal intermediary acting as an agent of the Defendant Secretary. 42 U.S.C. §1395h. The fiscal intermediary that acted on behalf of the Secretary with respect to the Hospitals was Blue Cross Blue Shield Association and its subcontractor, United Government Services ("UGS") and National Government Services, collectively referred to herein as the "Intermediary."

8. A provider may appeal the Secretary's final determination of total program

reimbursement to the PRRB pursuant to 42 U.S.C. § 1395oo(a)(1)(A)(2) if the provider "is dissatisfied with a final determination of the Secretary as to the amount of the payment under subsection (b) or (d) of section 1886" of the Medicare Act. The PRRB has jurisdiction over appeals from the Secretary's determinations if the provider is dissatisfied with the Secretary's final determination, the amount in controversy is equal to $10,000 or more, and the provider requests a hearing within 180 days after notice of the Secretary's determination. 42 U.S.C. §1395oo(a).

9. The Medicare regulation, 42 C.F.R. § 405.1841(b), provides as follows regarding the granting of a good cause exception to the deadline for filing an appeal with the PRRB:

> (b) ***Extension of time limit for good cause*** A request for a Board hearing filed after the time limit prescribed in paragraph (a) of this section shall be dismissed by the Board, except that for good cause shown, the time limit may be extended. However, no such extension shall be granted by the Board if such request is filed more than 3 years after the date the notice of the intermediary's determination is mailed to the provider.

10. The PRRB has long since recognized its inherent authority to review any matter covered by a cost report. Indeed, the Board stated this principle as early as 1979:

> The Board is of the opinion that it has [jurisdiction]. Under the provisions of 42 CFR § 405.1851, Subpart R, the Board must fully inquire into all matters at issue; and, under § 405.1869, the Board has the power to make any other modifications on matters covered by such cost report, even though such matters were not considered in the Intermediary's determination. Accordingly, for completeness of the record and in consideration of due process, the Board elicited from the parties additional evidence and/or argumentation concerning the appropriateness of whether the provider is entitled to "relief" under any of the exception provisions of § 405.460(f)(2) and (3).

PRRB Dec. No. 79-D22 (April 13, 1979) (Medicare and Medicaid Guide (CCH) ¶ 29,913.)

11. The recognition in 1979 by the PRRB of its inherent authority to review all matters covered by the cost report, with or without an explicit intermediary audit adjustment, presaged by nearly a decade the Supreme Court's similar pronouncement in the land mark decision of *Bethesda Hospital Association v. Bowen*, 485 U.S. 399 (1988). See also, *Loma Linda University Medical Center v. Blue Cross and Blue Shield Association of California*, Dec. 2001-D43 (August 30, 2001) (Medicare and Medicaid Guide (CCH) ¶ 80,7333) (rev'd, CMS Administrator, Nov. 1, 2001 (Medicare and Medicaid Guide (CCH) ¶ 80,786).

12. If a provider has satisfied the requirements for a hearing before the PRRB, the

provider has the right to add an issue to the appeal prior to the hearing. 42 C.F.R.§ 405.1841(a).

13. The PRRB *Instructions*, an informal guide not published in accordance with the notice and comment provisions of the APA, and thus lacking the force of law, nonetheless reflects the PRRB's formal, published statement regarding practice and procedure before the PRRB. The *Instructions* are posted on the world wide web.[1]

14. The PRRB *Instructions* reflect the provisions of 42 C.F.R.§ 405.1841(a) as follows:

> In an individual appeal, you may add issues to the appeal prior to the commencement of the hearing. You must identify the issues in writing and simultaneously furnish any supporting documentary evidence. (See Part I, B., II., a. Hearing Request for Individual Appeals.) The issues must be from the final determination(s) that is (are) the subject of your hearing request. The Board does not send written acknowledgement of the addition of issues to an existing appeal. Since you are responsible for addressing all issues in a position paper before the hearing, you should assume that the added issues are part of your appeal. In addition, the Board does not acknowledge, in writing, the transfer of issue(s) from an individual appeal to a group appeal, unless it will result in the closing of the individual case.
>
> Although issues may be added to an individual appeal even after you have filed your position paper, the Board will look with disfavor on issues that are added at the last minute. The Board encourages you to submit a supplemental position paper on any such added issue(s) at least 45 days before the hearing.
>
> *Instructions*, Section C.VI. Page 10

15. The Administrator of CMS has ruled that a provider has the right to add its appeal of a Routine Costs Limit ("RCL") determination to a pending appeal. *Twin Rivers Regional Medical Center v. Blue Cross and Blue Shield Association/Premera Blue Cross* (May 29, 2002) (Medicare and Medicaid Guide (CCH) ¶ 80,881). As stated by the CMS Administrator:

> In these cases, the record reflects that the Provider requested an RCL exemption for a three-year period; that the Provider timely appealed certain adjustments on its NPRs; that CMS rendered a determination on the SNF exemption request and that *the Provider added the SNF cost limit issue to the pending appeals*. Applying the above law to the facts in this case, the Administrator finds that the Board has jurisdiction to hear the Provider's appeals of CMS' denial of its RCL exemption request as it had a properly pending appeals of its NPRs to *which it added the RCL exemption issue, under 42 CFR 405.1841(a).* (Emphasis added.)

16. The PRRB has jurisdiction over all components of an adjustment. The *Instructions* provide, for example, in cases involving appeal of the disproportionate share ("DSH")

[1] http://www.cms.hhs.gov/PRRBReview/Downloads/PRRB_Instructions_March_03.pdf

adjustment, that there are a variety of components, each of which should be identified in an appeal:

> You must clearly and specifically identify your position in regard to the issues in dispute. For instance, if you are appealing an aspect of the disproportionate share (DSH) adjustment factor or calculation, do not define the issue as "DSH". *You must precisely identify the component of the DSH issue that is in dispute.*

*Instructions*, P. 7 (Emphasis added.)

17. Accordingly, and by way of example, the United States District Court for the District of Columbia has recognized that the Intermediary issues a single DSH Adjustment, and the provider has the right to appeal any or all of the components of the adjustment. *St. Joseph's Hospital v. Leavitt*, (D.C. Dist. 2006) U.S. Dist. Lexis 14272. Decisions of the PRRB recognize this principle. *See, e.g., Community Hospital of Monterrey Peninsula v. Blue Cross Blue Shield Association/United Government Services LLC-CA,* Dec. No. 2006-D13 (January 19, 2006) (Medicare and Medicaid Guide (CCH) ¶ 81,461) (Board asserted jurisdiction over a provider's appeal from a revised notice of program reimbursement ("Revised NPR") where the revised NPR adjusted for the component of "paid" Medicaid days and the provider appealed "unpaid" Medicaid days.) *See, also St. Rita's Medical Center v. Blue Cross and Blue Shield Association/AdminaStar Federal Ohio*, Dec. No. 2005-D41 (May 25, 2005) (Medicare and Medicaid Guide (CCH) ¶ 81,364) and *Rome Memorial Hospital v. Blue Cross Blue Shield Association/Empire Medicare Services*, PRRB Dec. No. 2005-D42 (April 6, 2005) (Medicare and Medicaid Guide (CCH) ¶ 81,365).

18. The United States Court of Appeals for the Ninth Circuit has held that "once the [PRRB] acquires jurisdiction pursuant to 42 U.S.C. §1395oo(a) over a dissatisfied provider's cost report on appeal from the intermediary's final determination of total reimbursement due for a covered year, it has discretion under §1395oo(d) to decide whether to order reimbursement of a cost or expense that was incurred within the period for which the cost report was filed, even though that particular expense was not expressly claimed or explicitly considered by the intermediary. In this, we join the First Circuit's similar view. *Maine General Med. Ctr. v. Shalala*, 205 F.3d 493 (1st Cir. 2000), *reh'g denied*, 210 F.3d 420 (1st Cir. 2000); *St. Luke's Hosp. v. Sec'y of Health & Human Servs.*, 810 F.2d 325 (1st Cir. 1987)." *Loma Linda University Medical Center v. Leavitt*, 492 F.3d 1065, 1068 (9th Circuit 2007).

19. In exercising its authority to conduct hearings, the PRRB must comply with all the provisions of Title XVIII of the Medicare Act and regulations issued thereunder, as well as CMS Rulings issued under the authority of the Administrator of the CMS. 42 C.F.R. § 405.1867.

20. A decision of the PRRB shall be final unless the Secretary, on the Secretary's own motion, and within 60 days after the provider of services is notified of the PRRB's decision, reverses, affirms, or modifies the PRRB's decision. 42 U.S.C. §1395oo(f)(1).

21. A provider has the right to obtain judicial review of any final decision of the PRRB, or any reversal, affirmance, or modification by the Secretary, 42 U.S.C. §1395oo(f)(1), by commencing an action within 60 days following the provider's receipt of such final decision. "Such action shall be brought in the district court of the United States for the judicial district in which the provider is located (or, in an action brought jointly by several providers, the judicial district in which the greatest number of such providers are located) or in the District Court for the District of Columbia . . . ." *id.*

## IV. MEDICARE PAYMENT TO A SKILLED NURSING FACILITY, ROUTINE COST LIMITS ("RCL"), AND THE RCL EXCEPTION REQUEST AND APPEAL PROCESSES

22. The Medicare Act defines a skilled nursing facility ("SNF") as an institution engaged in providing skilled nursing and related services for residents who require medical and nursing care or rehabilitative services for injured, disabled or sick persons. 42 U.S.C. § 1395i-3.

23. The Medicare program reimburses skilled nursing facility ("SNF") services based on reasonable costs, 42 U.S.C. § 1395x(v), subject to "routine cost limits" ("RCL"), 42 U.S.C. § 1395x(v)(7)(B), 42 U.S.C. 1395ww(a) AND 42 U.S.C. § 1395yy.

24. An SNF may be free standing or hospital based.

25. An SNF has the right to request an exception to the RCL, as set forth in the Medicare Act, 42 U.S.C. §1395yy(c):

> The Secretary may make adjustments in the limits set forth in subsection (a) with respect to any skilled nursing facility to the extent the Secretary deems appropriate, based upon case mix or circumstances beyond the control of the facility. The Secretary shall publish the data and criteria to be used for purposes of this subsection on an annual basis.

26. The Medicare regulation, 42 C.F.R. § 413.30, implements the cost

reimbursement limits for SNF, and 42 C.F.R. §413.30(f) provides an exception to the limits for providers of "Atypical Services."

27. The intent of Congress in providing an exception to the RCL was to compensate providers for the additional costs associated with the provision of atypical services to ensure that providers would be reimbursed their full costs for providing those additional services and that patients not covered by Medicare would not be unfairly burdened with subsidizing the cost of the care of Medicare patients. 42 U.S.C. §1395yy(a); 42 U.S.C. §1395x(v)(1)(A).

28. The Provider Reimbursement Manual ("PRM") is an explanatory guide not promulgated in compliance with the notice and comment requirements of the APA and, therefore, which does not have the force and effect of law.

29. PRM § 2534.5 instructs intermediaries to calculate RCL exceptions for SNFs at amounts exceeding 112 percent of the mean per diem routine service costs for hospital-based SNFs, rather than amounts exceeding the cost limit. (The "112% Rule")

30. For free standing SNF's, the 112% Rule has no effect because the RCL is set at 112% of the mean per diem routine service costs of free standing SNF's.

31. For hospital based SNF's, however, the RCL is set at the limit for free standing SNF's plus only 5% of the difference between the freestanding limit and 112% of the mean per diem routine service costs of hospital based SNF's. 42 U.S.C. § 1395yy.

32. The result of the application of the 112% Rule to a hospital based SNF, therefore, is that no allowance is made for atypical services unless the total cost of that category of services exceeds 112% of the SNF's mean per diem cost. Accordingly, a hospital based SNF with costs that exceed the RCL by less than 112% will always be denied an exception. Moreover, for a hospital based SNF that can satisfy the requirements of the 112% Rule, the exception is only to the extent that the SNF exceeds that amount. The hospital based SNF, therefore, incurs a loss equal to the difference between the hospital based limit and 112% of the mean per diem routine service costs of the SNF.

33. The application of the 112% Rule also requires that each category of cost be examined, and that any category of costs that exceeds the 112% threshold is offset to the extent that

costs in other categories are less than the 112% threshold. Thus, the application of the 112% Rule has the effect of confusing the concepts of "atypical total costs" with the concept of "costs of atypical services." This distinction was rejected in *Regents of the University of California on behalf of Davis Medical Center v. Schweiker*, 756 F.2d 1387 (9th Cir. 1985).

34. The Medicare regulations, 42 C.F.R. § 413.30(c)(2), prescribe the process for appealing a determination denying such a request:

(2) ***Skilled nursing facility exception*** The intermediary makes the final determination on the SNF's exception request and notifies the SNF of its determination within 90 days from the date that the intermediary receives the request from the SNF. If the intermediary determines that the SNF did not provide adequate documentation from which a proper determination can be made, the intermediary notifies the SNF that the request is denied. The intermediary also notifies the SNF that it has 45 days from the date on the intermediary's denial letter to submit a new exception request with the complete documentation and that otherwise, the denial is the final determination. The time required by the intermediary to review the request is considered good cause for the granting of an extension of the time limit for the SNF to apply for a PRRB review, as specified in §405.1841 of this chapter. ***The intermediary's determination is subject to review under subpart R of part 405 of this chapter.*** (Emphasis added.)

35. As provided by the applicable Medicare regulation, 42 C.F.R. § 413.30(c )(2), cited and quoted above, the process for appealing an RCL exception request is governed by subpart R of part 405 of chapter 42 of the Code of Federal Regulations, *i.e.*, the process for appealing a final determination before the PRRB.

## V. FACTS SPECIFIC TO THE HOSPITALS

**SAINT FRANCIS FYE 6/30/95**

36. Saint Francis operated a hospital based SNF during, among other cost reporting periods, fiscal year ended ("FYE") 6/30/95.

37. Saint Francis filed an RCL exception request for the hospital based SNF for, among other cost reporting periods, FYE 6/30/95.

38. The Intermediary applied the 112% Rule to Saint Francis's exception request

for the hospital based SNF for FYE 6/30/95.

**DAVIES FYE's 12/31/94 and 7/29/98**

39. Davies operated a hospital based SNF during, among other cost reporting periods, FYE'S 12/31/94 and 7/29/98.

40. Davies filed an RCL exception request for the hospital based SNF for, among other cost reporting periods, FYE's 12/31/94 and 7/29/98.

41. The Intermediary applied the 112% Rule to Davies's exception request for the hospital based SNF for FYE's 12/31/94 and 7/29/98.

## VI. THE HOSPITALS' APPEALS TO THE PRRB

**SAINT FRANCIS FYE 6/30/95**

42. By letter dated April 28, 1998 to the PRRB, Saint Francis timely requested a hearing before the PRRB to appeal the Intermediary's final determination of Medicare payment for FYE 6/30/95, to which the PRRB assigned individual appeal case number 98-2703.

43. By letter dated February 1, 1999, the Intermediary issued a revised NPR, which notified Saint Francis of the exception request.

44. On November 2, 1999, Saint Francis added to its individual appeal its appeal regarding the Intermediary's RCL determination by briefing the issue in its preliminary position paper.

45. By letter dated March 24, 2000, Saint Francis requested that the RCL appeal be transferred to and consolidated with group appeal number 98-3176G.

46. By letter dated October 24, 2006, the PRRB notified Saint Francis that the PRRB declined to assert jurisdiction over its appeal regarding the RCL determination for 6/30/95 based on the determination of the PRRB that Saint Francis did not file its appeal within 180 days of the revised NPR.

47. By letter dated November 3, 2006, Saint Francis, along with certain other participating providers in Group Appeal No.98-3176G, requested that the PRRB reconsider its jurisdiction decision.

48. By letter dated November 6, 2006, the PRRB granted Saint Francis's request,

along with the request of certain other participating providers in Group Appeal No.98-3176G, that the PRRB reconsider its jurisdiction decision.

49. By letter dated November 10, 2006, Saint Francis, along with certain other participating providers in Group Appeal No.98-3176G, submitted its Jurisdiction Brief.

50. By letter dated January 17, 2008, received by legal counsel for Saint Francis on January 21, 2008, the PRRB notified Saint Francis that, upon reconsideration, the PRRB again determined that it declined to assert jurisdiction over Saint Francis's appeal, based on the determination of the PRRB that Saint Francis did not file its appeal within 180 days of the revised NPR. (Exhibit 1.) The January 17, 2008 decision of the PRRB constitutes final agency action, over which this Court has jurisdiction. 42 U.S.C. § 1395oo(f)(1). The PRRB's letter stated as follows regarding Saint Francis's appeal right: "Review of this determination is available under the provisions of 42 U.S.C.§ 1395oo(f)(1) and 42 C.F.R. §§ 405.1875 and 405.1877."

**DAVIES**

**FYE 12/31/94**

51. By letter dated December 31, 1997 to the PRRB, Davies timely requested a hearing before the PRRB to appeal the Intermediary's final determination of Medicare payment for FYE 12/31/94, to which the PRRB assigned individual appeal case number 98-0574.

52. By letter dated March 1, 1999, the Intermediary issued a revised NPR, which notified Davies of the exception request.

53. By letter dated April 26, 2004, Davies added to its individual appeal its appeal regarding the Intermediary's RCL determination, and requested that the RCL appeal be transferred to and consolidated with group appeal number 98-3176G.

54. By letter dated October 24, 2006, the PRRB notified Davies that the PRRB declined to assert jurisdiction over Davies's appeal regarding the RCL determination for 12/31/94 based on the determination of the PRRB that Davies did not file its appeal within 180 days of the revised NPR.

55. By letter dated November 3, 2006, Davies, along with certain other participating providers in Group Appeal No.98-3176G, requested that the PRRB reconsider its

jurisdiction decision.

56. By letter dated November 6, 2006, the PRRB granted Davies's request, along with the request of certain other participating providers in Group Appeal No.98-3176G, that the PRRB reconsider its jurisdiction decision.

57. By letter dated November 10, 2006, Davies, along with certain other participating providers in Group Appeal No.98-3176G, submitted its Jurisdiction Brief.

58. By letter dated January 17, 2008, received by Davies's legal counsel on January 21, 2008, the PRRB notified Davies that, upon reconsideration, the PRRB again determined that it declined to assert jurisdiction over Davies's appeal, based on the determination of the PRRB that Davies did not file its appeal within 180 days of the revised NPR. (Exhibit 2.) The January 17, 2008 decision of the PRRB constitutes final agency action, over which this Court has jurisdiction. 42 U.S.C. § 1395oo(f)(1). The PRRB's letter stated as follows regarding Davies's appeal right: "Review of this determination is available under the provisions of 42 U.S.C.§ 1395oo(f)(1) and 42 C.F.R. §§ 405.1875 and 405.1877."

**FYE 7/29/98**

59. By letter dated February 15, 2001 to the PRRB, Davies timely requested a hearing before the PRRB to appeal the Intermediary's final determination of Medicare payment for FYE 7/29/98, to which the PRRB assigned individual appeal case number 01-1200.

60. By letter dated May 23, 2001, the Intermediary issued a revised NPR, which notified Davies of the exception request.

61. By letter dated April 26, 2004, Davies added to its individual appeal its appeal regarding the Intermediary's RCL determination, and requested that the RCL appeal be transferred to and consolidated with group appeal number 98-3176G.

62. By letter dated October 24, 2006, the PRRB notified Davies that the PRRB declined to assert jurisdiction over the Hospital's appeal regarding the RCL determination for 7/29/98 based on the determination of the PRRB that Davies did not file its appeal within 180 days of the revised NPR.

63. By letter dated November 3, 2006, Davies, along with certain other

participating providers in Group Appeal No.98-3176G, requested that the PRRB reconsider its jurisdiction decision.

64. By letter dated November 6, 2006, the PRRB granted Davies's request, along with the request of certain other participating providers in Group Appeal No.98-3176G, that the PRRB reconsider its jurisdiction decision.

65. By letter dated November 10, 2006, Davies, along with certain other participating providers in Group Appeal No.98-3176G, submitted its Jurisdiction Brief.

66. By letter dated January 17, 2008, received by Davies's legal counsel on January 21, 2008, the PRRB notified Davies that, upon reconsideration, the PRRB again determined that it declined to assert jurisdiction over Davies's appeal, based on the determination of the PRRB that Davies did not file its appeal within 180 days of the revised NPR. (Exhibit 3.) The January 17, 2008 decision of the PRRB constitutes final agency action, over which this Court has jurisdiction. 42 U.S.C. § 1395oo(f)(1). The PRRB's letter stated as follows regarding the Hospital's appeal right: "Review of this determination is available under the provisions of 42 U.S.C.§ 1395oo(f)(1) and 42 C.F.R. §§ 405.1875 and 405.1877."

**COUNT I**

67. The Hospitals incorporate paragraphs 1-66.

68. The Hospitals satisfied the jurisdictional prerequisites set forth in 42 U.S.C. § 1395oo(a) for receiving a hearing before the PRRB by timely filing a request for hearing regarding the Hospital's dissatisfaction with the final determination of the Intermediary, in the case of Saint Francis for FYE 6/30/95, and in the case of Davies for FYE'S 12/31/94 and 7/29/98, as set forth in the original NPR'S, and the total amount of payment due the Hospitals was in the amount of $10,000 or more.

69. The PRRB has discretion, under 42 U.S.C. §1395oo(d), to decide whether to order reimbursement of a cost or expense that was incurred within the period for which the cost report was filed, even though that particular expense was not expressly claimed or explicitly considered by the intermediary. *Loma Linda University Medical Center v. Leavitt*, 492 F.3d 1065, 1068 (9th Circuit 2007). See also, *Bethesda Hospital Association v. Bowen*, 485 U.S. 399 (1988), *Loma Linda*

*University Medical Center v. Blue Cross and Blue Shield Association of California*, Dec. 2001-D43 (August 30, 2001) (Medicare and Medicaid Guide (CCH) ¶ 80,7333) (rev'd, CMS Administrator, Nov. 1, 2001 (Medicare and Medicaid Guide (CCH) ¶ 80,786).

WHEREFORE, the Hospitals respectfully requests that the Court enter an order holding that the PRRB's January 17, 2008 decisions declining to assert jurisdiction are unlawful and setting such decisions aside because:

(a) The decisions unlawfully deprive the Hospitals of their right to appeal a final determination of the Secretary pursuant to 42 U.S.C. § 1395oo(a), 42 U.S.C. § 1395oo(d), 42 C.F.R. § 405.1835 and 42 C.F.R. § 413.30(c)(2);

(b) Its conclusion of law that the PRRB does not have jurisdiction over the Hospitals' appeals is not supported by substantial evidence; and

(c) Its conclusion of law that the PRRB does not have jurisdiction over the Hospitals' appeals is arbitrary and capricious, contrary to law, and an abuse of discretion.

**COUNT II**

70. The Hospitals incorporate paragraphs 1-69.

71. The Hospitals satisfied the jurisdictional prerequisites set forth in 42 U.S.C. § 1395oo(a) for receiving a hearing before the PRRB by timely filing a request for hearing regarding the Hospitals' dissatisfaction with the final determination of the Intermediary, in the case of Saint Francis for FYE 6/30/95, and in the case of Davies for FYE'S 12/31/94 and 7/29/98, as set forth in the original NPR'S, and the total amount of payment due the Hospitals was in the amount of $10,000 or more.

72. The Hospitals had the right to add to their properly pending appeals, in the case of Saint Francis for FYE 6/30/95, and in the case of Davies for FYE's 12/31/94 and 7/29/98, the Hospitals' appeal regarding the Intermediary's RCL determination. 42 C.F.R.§ 405.1841(a); PRRB *Instructions*, Section C.VI. Page 10.; and *Twin Rivers Regional Medical Center v. Blue Cross and Blue Shield Association/Premera Blue Cross* (May 29, 2002) (Medicare and Medicaid Guide (CCH) ¶ 80,881).

73. The Hospitals added to their properly pending appeals, in the case of Saint

Francis for FYE 6/30/95, and in the case of Davies for FYE's 12/31/94 and 7/29/98, the Hospitals' appeals regarding the Intermediary's RCL determination.

WHEREFORE, the Hospitals respectfully request that the Court enter an order holding that the PRRB's January 17, 2008 decisions declining to assert jurisdiction are unlawful and setting such decisions aside because:

(a) The decisions unlawfully deprive the Hospitals of their right to appeal final determinations of the Secretary pursuant to 42 U.S.C. § 1395oo(a); 42 C.F.R.§ 405.1841(a); 42 C.F.R. § 413.30(c)(2) PRRB *Instructions*, Section C.VI. Page 10; and *Twin Rivers Regional Medical Center v. Blue Cross and Blue Shield Association/Premera Blue Cross* (May 29, 2002) (Medicare and Medicaid Guide (CCH) ¶ 80,881).

(b) Its conclusion of law that the PRRB does not have jurisdiction over the Hospitals' appeals is not supported by substantial evidence; and

(c) Its conclusion of law that the PRRB does not have jurisdiction over the Hospitals' appeals is arbitrary and capricious, contrary to law, and an abuse of discretion.

**COUNT III**

74. The Hospitals incorporate paragraphs 1-73.

75. The Hospitals are entitled to a hearing before the PRRB regarding their appeal of the Intermediary's final determination of the Hospitals' RCL exception request, in the case of Saint Francis for FYE 6/30/95, and in the case of Davies for FYE's 12/31/94 and 7/29/98.

WHEREFORE, the Hospitals respectfully request that the Court enter an order:

(a) That the Secretary remand these appeals in writing to the PRRB, with copy of such writing to legal counsel for the Hospitals, instructing the PRRB (1) to assert jurisdiction over and reinstate the appeals of the Hospitals, and (2) to issue a letter to the Hospitals and the Medicare fiscal intermediary no later than thirty days following the date of remand to the PRRB, with copy to legal counsel for the Hospitals, notifying them that the PRRB has asserted jurisdiction over and reinstated the appeals, and scheduling proceedings on the merits;

(b) That this the Court shall retain jurisdiction over this case for purposes of enforcement of the Secretary's compliance with this Court's order, and the PRRB's compliance with

the remand instructions of the Secretary, upon motion of the Hospitals;

(c) That the Secretary award the Hospitals legal fees and costs; and

(d) That the Court award the Hospitals such other relief as the Court may deem just and proper under the circumstances.

Dated: March 12, 2008.

LAW OFFICES OF GARY E. GLEICHER

By: _____
GARY E. GLEICHER

Attorneys for SAINT FRANCIS MEMORIAL HOSPITAL and FRANKLIN BENEVOLENT CORPORATION F/K/A DAVIES MEDICAL CENTER

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Suzanne Cochran, Esq., Chairperson
Elaine Crews Powell, CPA
Anjali Mulchandani-West
Yvette C. Hayes
Michael D, Richards

98-3176G
CERTIFIED MAIL
Refer to:

JAN 17 2008

Kenneth R. Marcus, Esq.
Honigman, Miller, Schwartz & Cohn, LLP
660 Woodward Avenue
Detroit, MI 48226-3606

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RE: St. Francis Memorial Hospital as a participant in the QRS Applicability of the 112% of the Peer Group Mean
Provider No. 05-0152
Case No. 98-3176G
FYE 6/30/95

Dear Mr. Marcus and Mr. Garcia:

The Provider Reimbursement Review Board (Board) has granted the request to reconsider its decision to deny jurisdiction over several Providers participating in the above-referenced group appeal. The Board's jurisdictional determination with regard to St. Francis Memorial Hospital fiscal year end June 30, 1995, is set forth below.

**Background**

On November 14, 1997, the original Notice of Program Reimbursement (NPR) for St. Francis Memorial Hospital fiscal year end June 30, 1995, was issued. On April 28, 1998, the Provider timely requested an individual appeal. The individual appeal was assigned case number 98-2703. On February 1, 1999, the revised NPR including the routine cost limit (RCL) exception determination was issued. On November 2, 1999, the Provider added the 112% issue to its individual appeal by briefing the issue in its preliminary position paper. On March 24, 2000, the Provider transferred the 112% issue to case number 98-3176G. On October 18, 2004, case number 98-2703 was closed. The Intermediary challenged the Board's jurisdiction over the Provider as part of case number 96-3176G. On October 24, 2006, the Board concluded that it did not have jurisdiction over the Provider as part of case number 98-3176G because the Provider did not file a timely request for hearing from the revised NPR that gave rise to the cause of action. The Provider was dismissed from the group appeal. On November 3, 2006, the Provider requested that the Board reconsider its jurisdiction decision. The Provider submitted a jurisdiction brief on November 10, 2006.

**Board's Decision**

The Board grants the Provider's request to reconsider its jurisdiction decision. However, the Board majority concludes that it does not have jurisdiction over St. Francis Memorial Hospital for fiscal year ending June 30, 1995, as part of case number 98-3176G. There is no new information that would warrant the Board changing its previous decision. The Provider did not

file a timely request for hearing from the February 1, 1999, revised NPR that gave rise to the cause of action. The question of reimbursement for costs between 100 and 112% of the costs in excess of the limits did not arise until an exception determination had been made. In this case, the Provider did not file an appeal of the RCL determination within 180 days of the revised NPR implementing the determination as required by 42 U.S.C. 1395oo (a) and 42 C.F.R. §§ 405.1835 and 405.1889. The Provider did not attempt to appeal the revised NPR until November 2, 1999, (274 days after the issuance of the revised NPR giving rise to the cause of action).

Review of this determination is available under the provisions of 42 U.S.C. §1395oo (f) (1) and 42 C.F.R. §§ 405.1875 and 405.1877.

Board Members Participating
Yvette C. Hayes (dissenting)
Michael D. Richards
Anjali Mulchandani-West
Elaine Crews Powell, CPA
Suzanne Cochran, Esq.

For the Board:

Suzanne Cochran, Esq.
Chairperson

cc: Wilson C. Leong, Blue Cross & Blue Shield Association
Bernard M. Talbert, Esq., Blue Cross & Blue Shield Association

Enclosure: 42 U.S.C. § 1395oo (f) (1) & 42 C.F.R. §§ 405.1875 and 405.1877

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**Elaine Crews Powell, CPA**
**Anjali Mulchandani-West**
**Yvette C. Hayes**
**Michael D, Richards**

98-3176G
Refer to: CERTIFIED MAIL

JAN 17 2008

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George Garcia
National Government Services, LLC-CA
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Indianapolis, IN 46207-7191

RE: Davies Medical Center as a participant in the QRS Applicability of the 112% of the Peer Group Mean
Provider No. 05-0008
Case No. 98-3176G
FYE 12/31/94

Dear Mr. Marcus and Mr. Garcia:

The Provider Reimbursement Review Board (Board) has granted the request to reconsider its decision to deny jurisdiction over several Providers participating in the above-referenced group appeal. The Board's jurisdictional determination with regard to Davies Medical Center fiscal year end December 31, 1994, is set forth below.

**Background**

On September 30, 1997, the original Notice of Program Reimbursement (NPR) for Davies Medical Center fiscal year end December 31, 1994, was issued. On December 31, 1997, the Provider timely requested an individual appeal. The individual appeal was assigned case number 98-0574. On March 1, 1999, the revised NPR including the routine cost limit (RCL) exception determination was issued. On April 26, 2004, the Provider added the 112% issue to its individual appeal and transferred it to case number 98-3176G. Case number 98-0574 was closed on September 30, 2004. The Intermediary challenged the Board's jurisdiction over the Provider as part of case number 96-3176G. On October 24, 2006, the Board concluded that it did not have jurisdiction over the Provider as part of case number 98-3176G because the Provider did not file a timely request for hearing from the revised NPR that gave rise to the cause of action. The Provider was dismissed from the group appeal. On November 3, 2006, the Provider requested that the Board reconsider its jurisdiction decision. The Provider submitted a jurisdiction brief on November 10, 2006.

**Board's Decision**

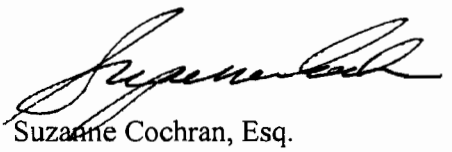
The Board grants the Provider's request to reconsider its jurisdiction decision. However, the Board concludes that it does not have jurisdiction over Davies Medical Center for fiscal year ending December 31, 1994, as part of case number 98-3176G. There is no new information that would warrant the Board changing its previous decision. The Provider did not file a timely request for hearing from the March 1, 1999, revised NPR that gave rise to the cause of

action. The question of reimbursement for costs between 100 and 112% of the costs in excess of the limits did not arise until an exception determination had been made. In this case, the Provider did not file an appeal of the RCL determination within 180 days of the revised NPR implementing the determination as required by 42 U.S.C. 1395oo (a) and 42 C.F.R. §§ 405.1835 and 405.1889. The Provider did not attempt to appeal the revised NPR and transfer the 112% issue to CN: 98-3176G until April 26, 2004, (1825 days after the issuance of the revised NPR giving rise to the cause of action).

Review of this determination is available under the provisions of 42 U.S.C. §1395oo (f) (1) and 42 C.F.R. §§ 405.1875 and 405.1877.

Board Members Participating
Yvette C. Hayes
Michael D. Richards
Anjali Mulchandani-West
Elaine Crews Powell, CPA
Suzanne Cochran, Esq.

For the Board:



Suzanne Cochran, Esq.
Chairperson

cc: Wilson C. Leong, Blue Cross & Blue Shield Association
Bernard M. Talbert, Esq., Blue Cross & Blue Shield Association

Enclosure: 42 U.S.C. § 1395oo (f) (1) & 42 C.F.R. §§ 405.1875 and 405.1877

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**Yvette C. Hayes**
**Michael D, Richards**

98-3176G
Refer to: CERTIFIED MAIL

JAN 17 2008

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George Garcia
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Indianapolis, IN 46207-7191

RE: Davies Medical Center as a participant in the QRS Applicability of the 112% of the Peer Group Mean
Provider No. 05-0008
Case No. 98-3176G
FYE 7/29/98

Dear Mr. Marcus and Mr. Garcia:

The Provider Reimbursement Review Board (Board) has granted the request to reconsider its decision to deny jurisdiction over several Providers participating in the above-referenced group appeal. The Board's jurisdictional determination with regard to Davies Medical Center fiscal year end July 29, 1998, is set forth below.

**Background**

On August 24, 2000, the original Notice of Program Reimbursement (NPR) for Davies Medical Center fiscal year end July 29, 1998, was issued. On February 15, 2001, the Provider timely requested an individual appeal. The individual appeal was assigned case number 01-1200. On May 23, 2001, the revised NPR including the routine cost limit (RCL) exception determination was issued. On April 26, 2004, the Provider added the 112% issue to its individual appeal and transferred it to case number 98-3176G. The Intermediary challenged the Board's jurisdiction over the Provider as part of case number 96-3176G. On October 24, 2006, the Board concluded that it did not have jurisdiction over the Provider as part of case number 98-3176G because the Provider did not file a timely request for hearing from the revised NPR that gave rise to the cause of action. The Provider was dismissed from the group appeal. On November 3, 2006, the Provider requested that the Board reconsider its jurisdiction decision. The Provider submitted a jurisdiction brief on November 10, 2006. On December 7, 2007, case number 01-1200 was closed.

**Board's Decision**

The Board grants the Provider's request to reconsider its jurisdiction decision. However, the Board concludes that it does not have jurisdiction over Davies Medical Center for fiscal year ending July 29, 1998, as part of case number 98-3176G. There is no new information that would warrant the Board changing its previous decision. The Provider did not file a timely request for hearing from the May 23, 2001, revised NPR that gave rise to the cause of

action. The question of reimbursement for costs between 100 and 112% of the costs in excess of the limits did not arise until an exception determination had been made. In this case, the Provider did not file an appeal of the RCL determination within 180 days of the revised NPR implementing the determination as required by 42 U.S.C. 1395oo (a) and 42 C.F.R. §§ 405.1835 and 405.1889. The Provider did not attempt to appeal the revised NPR and transfer the 112% issue to CN: 98-3176G until April 26, 2004, (1065 days after the issuance of the revised NPR giving rise to the cause of action).

Review of this determination is available under the provisions of 42 U.S.C. §1395oo (f) (1) and 42 C.F.R. §§ 405.1875 and 405.1877.

Board Members Participating
Yvette C. Hayes
Michael D. Richards
Elaine Crews Powell, CPA
Suzanne Cochran, Esq.

For the Board:

Suzanne Cochran, Esq.
Chairperson

cc: Wilson C. Leong, Blue Cross & Blue Shield Association
Bernard M. Talbert, Esq., Blue Cross & Blue Shield Association

Enclosure: 42 U.S.C. § 1395oo (f) (1) & 42 C.F.R. §§ 405.1875 and 405.1877